No. 386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

FEDERAL POWER COMMISSION,

Petitioner,

v.

TEXACO INC. AND PAN AMERICAN PETROLEUM CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF TEXACO INC. FOR ORDER PERFECTING PROPER VENUE ON REMAND AND BRIEF IN SUPPORT ON MOTION

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Texaco Inc. (Texaco), a Respondent in the above styled cause, pursuant to Rule 35 of the Revised Rules of this Court, respectfully moves that this Court, concurrently with issuance of its mandate in this matter and in order to preserve Texaco's ability to obtain consideration of the remaining and as yet unreviewed issues in this cause, Order:

(1) That insofar as the Respondent Texaco Inc. is concerned, remand of these matters should be directed to the United States Court of Appeals for the Third Circuit, an appellate court found by this Court in its Opinion of April 20, 1964, to be a court properly having venue in the premises; or, alternatively,

(2) That upon remand of these matters to the United States Court of Appeals for the Tenth Circuit, that Circuit is to effect the transfer of these matters, insofar as they relate to Texaco Inc. (No. 7217, below), to the Third Circuit for disposition of the remaining and as yet unreviewed questions.

The Court below having decided that the orders of the Federal Power Commission (Commission), brought to it for review, pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), were void for lack of statutory power in that agency (R. 121)[1] did not reach the remaining points for review raised in Texaco's Petition for Review (R. 8-11). Texaco has an urgent and direct interest in obtaining judicial consideration of those matters which are beyond the threshold issue of power to act, which was the issue disposed of by this Court's decision of April 20, 1964. Since this Court also held that venue was not properly with the Tenth Circuit to consider any of these issues, transfer to the circuit where this Court's opinion indicates venue properly lies, is requested.

This Court possesses the inherent authority, recognized in the common law even before the formation of our Nation, to effect such a change of venue under appropriate circumstances. The fundamental importance and significance of this case which prompted this Court to grant certiorari warrant the Court's assistance in the maintenance of the viability of these matters so that complete, fair, and thorough review can be achieved.

[1] References here, and in the attached brief, are to the printed record in this Court.

Pursuant to Rule 35 of the Revised Rules of this Court, Texaco has attached hereto its Brief in support of this Motion..

Respectfully submitted,

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May, 1964

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BRIEF OF TEXACO INC. IN SUPPORT OF MOTION FOR ORDER PERFECTING PROPER VENUE ON REMAND

INTRODUCTORY STATEMENT

Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), requires that petitions to review orders of the Federal Power Commission (Commission) be filed "within sixty days after the order of the Commission upon the application for rehearing." The letter order forming the basis of this action was entered November 30, 1962 (R. 70-71).

By the decision and accompanying opinion entered April 20, 1964, in *Federal Power Commission* v. *Texaco Inc.*, ... U.S. ....., this Court held that the Court of Appeals for the Tenth Circuit erred in failing to dismiss for lack of

venue the Petition For Review (R. 1-28) filed by Texaco Inc. (Texaco) seeking review of certain orders of the Commission. This Court held that the term "located" as used in the venue provisions of Section 19 (b) of the Natural Gas Act, "in the setting of this Act . . . refers in the case of Texaco to its State of incorporation." (Slip op., p. 5). Texaco is a Deleware Corporation (R. 2), and, as such, is "located" within the Third Circuit.

Thus, it seems that unless this Court issues some order which assures the remand of this proceeding to a court of proper venue, Texaco may be deprived of an opportunity to have the substantial remaining and yet-unreviewed issues which surround these orders judicially considered.

SUMMARY OF ARGUMENT

1. Texaco's further review action is jeopardized by questions of venue—not jurisdiction. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635 (1945). The inherent power "thoroughly engrafted upon the common law long before the independence of this country" exists with this Court to effect transfer of these proceedings to assure proper venue. *Crocker* v. *Justices of Superior Court*, 208 Mass. 162, 94 N.E. 369 (1911).

2. The importance of a full consideration of the "merits" or "reasonableness" of the Commission's orders in this instance has been laid bare upon this record and has been highlighted most recently by the royalty payment decision of the Fifth Circuit in *Foster* v. *Atlantic Refining Co.*, ... F. 2d ....., No. 20642, March 26, 1964. In such circumstances the powers of this Court should be exercised in a manner which will prevent hardship and injustice and insure that the merits of the cause may be fairly tried. *Eberly* v. *Moore*, 24 How. 147 (1861).

ARGUMENT

I. This Court possesses the inherent power to effect a transfer for venue purposes.

In *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635 (1945), the Court noted that Congress has vested "all intermediate Federal courts with the power to review orders of the Commission." 324 U.S. at 638. Questions of venue, going to fairness and convenience are quite apart and separate from a lack of jurisdiction, and historically such venue problems can be rectified by transfer to the proper forum. *Cf. Goldlawr* v. *Heiman*, 369 U.S. 463 (1962); 28 U.S.C. 1406. But the perfection of such a transfer is not limited to those situations where a specific statute exists.

The major treatise writers agree that while there are some statements asserting that venue transfers are only undertaken pursuant to direct statutory authority:

> ". . . according to the weight of authority as well as sound reasoning, common-law courts have inherent power, particularly in criminal cases, to order a change of venue for purposes of securing impartial trials; the power of the English courts to transfer the trial of transitory actions, thoroughly engrafted upon the common law long before the independence of this country, is a part of our common-law heritage, and unless specifically denied by statute the power still inheres in the courts of this country." (notes omitted)
>
> 56 Am. Jur., Venue § 42.

The conclusion is similarly stated in other compendia, 27 R.C.L., Venue § 30:

> ". . . The authority to change the venue of civil cases under appropriate circumstances seems also to have

existed at common law, and to have become a part of our judicial system."

See also, 92 C.J.S., Venue § 129. These writers draw heavily on the scholarly research of the Massachusetts high court in *Crocker* v. *Justices of Superior Court*, 208 Mass. 162, 94 N.E. 369 (1911), but the highest courts of a number of the states have themselves utilized this power, or enforced its use.[1] The instances where this inherent authority has not been used have been said to arise only where there are specifically-limited constitutional provisions, or where there exist statutes which cover the entire venue area "in great detail and leave nothing to be governed by the common law." *Crocker* v. *Justices of Superior Court, supra.*

Recently the Fifth Circuit in *Gulf Oil Corp.* v. *Federal Power Commission*, ... F. 2d ....., No. 21151, opinion on petition for rehearing, April 15, 1964, refused to order a transfer in the absence of a specific statutory directive. The Fifth Circuit refused to effect a transfer of this action to a circuit court properly having venue of the matter because (1) there was no statute directly requiring it to do so, (2) no direct decisional authority was cited to support the request, (3) at common law a venue objection went in abatement rather than in bar, (4) in the wealth of reports there should be more decisions holding for transfer than the single one cited to it, and (5) Congress has passed a statute providing for district court transfers. Clearly, not

[1] *Anderson* v. *Johnson*, 1 Utah 2d 400, 268 P. 2d 427 (1954); *Day* v. *Day*, 12 Idaho 556, 86 Pac. 531 (1906); *English* v. *Brigman*, 227 N.C. 260, 41 S.E. 2d 732 (1947); *Cochecho Railroad* v. *Farrington*, 26 N.H. 428 (1853); *Commonwealth* v. *Balph*, 111 Pa. 365, 3 Atl. 220, (1886); *Negro Jerry* v. *Townshend*, 2 Md. 274 (1892) *People* v. *Peterson*, 93 Mich. 26, 52 N.W. 1039 (1892); *People* v. *McLaughlin*, 150 N.Y. 365, 44 N.E. 1017 (1896); *State* v. *Miller*, 15 Minn. 344 (1870); *Barry* v. *Truax*, 13 N.D. 131, 99 N.W. 769 (1904); *Commonwealth* v. *Davidson*, 91 Ky. 162, 15 S.W. 53 (1891).

one of these points is a valid basis for this Court failing to transfer in the instant circumstance.

We have above cited the decisional authority supporting this transfer request, which authority all holds that for a constitutional court such as the Court here no express statutory authority is necessary. Furthermore, the very fact that a venue question was not a common law bar to the action supports the requested transfer,[2] since, as this Court held in *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission, supra*, the instant statute is not one where Congress has engrafted a jurisdictional element into a venue provision. *Cf. Schoen* v. *Mountain Producers Corp.*, 170 F. 2d 707 (3rd Cir, 1948) at 711. While it is recognized that dismissal for improper venue has been ordered on numerous occasions over the years, since the question of transfer was not raised in those cases they are not precedent for denial of the request here. The few cases directly arising on the issue of transfer are all District Court cases, and the matter appears never to have been discussed by the Court of Appeals or by this Court. *Kibler* v. *Transcontinental & Western Air* (EDNY 1945), 63 F. Supp. 724; *Billings Utility Co* v. *Federal Reserve Bank* (D. Mont. 1941), 40 F. Supp. 309; *Lavieties* v. *Ferro Stamping & Mfg. Co.*, (ED Mich. 1937), 19 F. Supp. 561, aff'd (6th Cir., 1941), 121 F. 2d 455, *cert. denied*, 315 U.S. 817 (1942).[3] Insofar as the

[2] Of significance here is 28 U.S.C. 2105: "There shall be no reversal in the Supreme Court or a court of appeals for error upon matters in abatement which do not involve jurisdiction."

[3] In the *Lavieties* case the court did not use the lack of statutory power as the reason for denying transfer, but rather looked to reasons "based on justice"; in *Billings Utility Co.* the court did note the lack of a specific statute, but indicated that the moving party did not advance any authority to support the motion; in *Kibler* the court did not dismiss, and thus commented on transfer only to say that no specific administrative machinery existed to accomplish such transfer. This latter argument is hardly a grounds to deny substantial justice.

question of specific statutory directives such as 28 U.S.C. 1406(a), which directs transfer by the district courts, are concerned, it is significant that Congress incorporated this codification of the common law transfer power the very first time it undertook a comprehensive review of the Judicial Code after it was reported that the District Courts refused to exercise the transfer powers. Thus, the adoption of the statute cannot be interpreted to derogate the existence of any such inherent authority, and particularly the existence of such power in this court.

Furthermore, the legislative history of Section 1406(a) shows that as initially enacted on June 25, 1948, c. 646, 62 Stat. 937, at the time of the 1948 revision of the Judicial Code, the section required transfer in every case where venue improperly lay. The following year the section was amended to make it clear that the courts might decline transfer where it would not be in the interests of justice to move the case. Thus, the legislative history of 28 U.S.C. 1406(a) indicates that it was passed to guarantee the common law idea of fairness. Congress feared that too much liberality was available, and that parties might intentionally bring actions in the wrong court in order to obtain service upon the defendant. The statute was changed to restrict this practice and thus "promote justice." 1949 USC Cong. Serv., pp. 1251, 1253. See also Annotation, "Transfer to Proper District," 8 L. ed. 2d 852.

Most assuredly, the statute was not enacted to restrict this court or other courts in their inherent common law powers affecting "all Cases, in Law and Equity." U.S. Const. art. III § 2.

II. This Court should, in the interests of justice, transfer this matter.

Initially it should be recognized that Texaco's Petition

for Review was not filed with the Tenth Circuit to delay, harass or disrupt the Commission.[4] While the statutory intent of the Natural Gas Act venue provisions had not been passed upon by this Court, Texaco's interpretation was adopted by the full panel below (R. 112); this exact same interpretation had not previously been challenged by the Commission, *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 147, *cert. denied Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S. 823 (1961); and any number of other cases, brought in circuits where the natural gas company affected by the order was neither incorporated nor had its principal place of business had gone unchallenged as to venue (R. 110). While we do not argue "entrapment," we do feel the above background does support and warrant this Court's use of its inherent powers to insure preservation of Texaco's remaining rights in this matter.

All parties have recognized that as to the Commission's challenged orders, the Court below reached only the threshold issue of "power" and the decision below and the matters briefed and argued here did not go to the "reasonableness" of those orders, assuming the power did exist. Petition of the Federal Power Commission for Writ of Certiorari, pp. 2, 10; Brief of Petitioner, Federal Power Commission, pp. 2, 11, 13, 15, 19; Motion of The People of the State of California and the California Public Utilities Commission, pp. 2, 3; Brief of Respondent, Texaco Inc., pp. 2, 10, 61; Brief of Respondent Pan American Petroleum Corp., pp. 2, 3, 14. Having reversed on this threshold point

[4] With Pan American Petroleum Corp.'s petitions already there, Texaco adopted that brief, the Commission filed but a single brief below, eight cases were argued simultaneously and many actual conveniences were achieved. (R. 72-73). In fact, the case was ripe for transfer to the Tenth Circuit even if filed elsewhere. 28 U.S.C. 2112.

of authority, and remaining points of the Petition for Review not yet having been considered by the lower court, this cause is ripe for remand. *Texas Gas Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1960); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).[5] However, by its Opinion of April 20, 1964, this Court has now held that the Tenth Circuit lacks venue to consider these matters further. Fairness, simple justice, and equity support action by this Court to insure that Texaco can be heard on the remaining issues. Granting the relief sought in the accompanying Motion will produce this result.

In the past the Court has displayed a familiarity with the economic pressures working on those selling a commodity under any long-term contract. *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958). The stringency of such problems was recently accented when the Fifth Circuit held that a producer operating a lease calling for royalty on the not uncommon basis of "the market price" prevailing for the field could not rely upon the fixed pricing provisions of his long-term gas sales contract as being determinative of that "market price." *Foster* v. *Atlantic Refining Co.*, ... F. 2d ....., No. 20642, March 26, 1964. The court took direct cognizance of the practicalities of the gas industry which require the use of long-term contracts (Slip Op., p. 4). But the way for the producer to do something "to protect itself against increases in price" and concomitant royalty increases, said the court, is the inclusion in the contract "of escalation provisions which would have assured the lessees the prevailing prices during the periods in question . . ." (Slip Op., pp. 5, 6)

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[5] In *United States* v. *Storer Broadcasting Co.* the Court held:

"We reverse the judgment of the Court of Appeals and remand the case to that court so that it may consider respondent's other objections." 351 U.S. at 206.

The lease which Texaco holds on the lands covered by the contract in the instant litigation, a contract which the Commission has rejected because Texaco proposes to renegotiate with the purchaser at intervals during the long contract term (R. 50-52) contains provisions, *inter alia*, for royalty payment on the basis of "market value." Certainly such matters should be carefully considered in determining the reasonableness of the orders proscribing certain clauses. Surely justice and equity dictate that this Court exercise its inherent powers to assist Texaco in achieving the full review contemplated by the Natural Gas Act. *Eberly* v. *Moore*, 24 How. 147 (1861).

CONCLUSION

For the reasons hereinabove set forth, Texaco urges that this Court order the action sought by the accompanying Motion.

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